90-240

Supreme Court, U.S.
FILED
JUL 9
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The Supreme Court of the United States

OCTOBER TERM, 1990

JAMES L. POLK AND MATTIE B. POLK,
Petitioners

VERSUS

DIXIE INSURANCE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule of Batson v. Kentucky, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) applies to civil cases between private parties.

2. Whether the United States Constitution prohibits a private party from exercising peremptory challenges based upon race.

3. Whether governmental action is present when private parties exercise their peremptory challenges to excuse black jurors because of their race.

4. Whether a civil litigant, in United States District Court, may utilize peremptory challenges to challenge all black jurors without stating any non-racial reason.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at ____ F. 2d ____ (5th Cir. 1990). It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 11, 1990. This Court has jurisdiction to review by Writ of Certiorari under 28 USC Sec. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Five, which says:

> "No person shall be...deprived of life, liberty or property without due process of law...."

This Constitutional provision incorporates the requirement that black citizens be afforded the "equal protection of the laws". Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

STATEMENT OF THE CASE

Black Plaintiffs, James L. Polk and Mattie B. Polk, filed suit in the Circuit Court of Marshall County, Mississippi alleging that the Defendant, Dixie Insurance Company, issued an insurance policy on James L. Polk's 1981 Cadillac and refused payment when the automobile burned. R. 8-10.

Alleging diversity of citizenship, the Defendant removed the case to the United States District Court for the Northern District of Mississippi. R. 1-4. This removal had the effect of greatly diminishing the prospects of having any blacks on a jury, since Marshall County, Mississippi is predominantly black, while the venue site of the United States District Court for the Northern District of Mississippi at Oxford is overwhelmingly white.

Defendant, Dixie Insurance Company, answered the suit claiming that James Polk had intentionally burned his own automobile. R. 44-58.

Voir dire examination for the trial was had on August 29, 1988. T, 1-42.

During the voir dire examination, the attorney for Dixie Insurance Company exercised peremptory challenges on the only two

(2) black jurors, leaving the black Plaintiffs with an all white jury.

The following occurred:

> "MR. WAIDE (counsel for Polks): Excuse me. Before we read the jury list, I have a Motion I would like to put in the record based on the challenges that the defense counsel exercised.
>
> THE COURT: You understand that the government is not involved in this case?
>
> MR. WAIDE: Yes, sir, I do, Your Honor, but nevertheless, there is — well let me just state my Motion for the record if I might Your Honor.
>
> The Plaintiff moves the Court to require defense to state some reason in the record for her exercising peremptory challenges on the only black jurors that were tendered to her, and we would show to the Court that there are black Plaintiffs in this case and all the representatives at the defense table are white. There were only two blacks tendered to the Defendants, of which they challenged both, and one of these blacks is actually employed by an insurance company.
>
> We believe that that constitutes exercising the challenges on grounds of race, and although this is not a criminal case, the black people on the jury panel have a right to be considered on an impartial basis for jury duty, and we have standing to raise that issue and we believe that they should be required to not exercise on blacks or to indicate some non-racial motive for exercising those challenges.
>
> THE COURT: All right, that Motion will be denied, the government not being involved in this case."

R. 30-31.

An all white jury was seated, after which evidence was received presenting a direct conflict as to whether the Polks were entitled to the policy proceeds. James Polk testified that the insured automobile was destroyed by fire, when he went to sleep at the wheel during the early morning hours of July 30, 1986. The car accident-

ally ran off the highway, crashed and burned. T. 96. Polk swore the automobile was worth more than its insured value, and that he would never have intentionally burned it. T. 80-85.

On the other hand, the Defendant insurance company presented testimony by a volunteer fire chief, T. 164, and their arson expert, T. 183-186, that in their opinion, the car was deliberately burned.

The insurance company also presented evidence that Polk had purchased another automobile shortly before the accident and that Polk had been laid off from work a short time before the accident. T. 50. From this, it was the insurance company's contention that Polk had deliberatly burned the car and had lied when he said the burning was an accident.

The all white jury resolved the factual issues in the insurance company's favor. T. 300, R. 490. The District Court entered final judgment in favor of the insurance company on the verdict, R. 491. Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. Their appeal alleged error in the following respect:

> "By refusing to require Defendant insurance company to state some non-racial reason for excluding black persons from the black Plaintiffs' jury, the Court denied Plaintiffs equal protection of the law as guaranteed by United States Constitution Amendment 5."

Appelants' Fifth Circuit Brief, pp. 20.

Various other errors were assigned which are not pertinent to this Petition. Appellants' Brief, pp. 24-32.

On April 11, 1990, the United States Court of Appeals for the Fifth Circuit affirmed. The Court gave only perfunctory attention to Plaintiffs' claim that they were the victims of a denial of equal protection in the selection of the jury, finding that its en banc decision in Edmondson v. Leesville Concrete Co., Inc., 895 F. 2d 218 (5th Cir. 1990) compelled a ruling against the Polks on this point. The Fifth Circuit gave a detailed treatment to other assignments of error presented by the Polks, and rejected them.

ARGUMENT

THE WRIT SHOUD BE GRANTED, SINCE THE FIFTH CIRCUIT'S DECISION IS CONTRARY TO THE HOLDINGS OF OTHER CIRCUITS: SINCE THE FIFTH CIRCUIT'S HOLDING IS INCONSISTENT WITH BATSON V. KENTUCKY, 476 U. S. 79, 106 S. CT. 1712, 90 L. ED. 2d 69; AND SINCE THE FIFTH CIRCUIT'S RULING IS INCONSISTENT WITH VARIOUS PRECEDENTS OF THIS COURT DELINEATING THE MEANING OF FOURTEENTH AND FIFTH AMENDMENT "STATE ACTION".

This case presented a classic issue of fact. On the one hand, the black Plaintiffs swore that there had been an automobile accident in which insured automobile was totally destroyed by fire. On the other hand, the Defendant insurance company produced expert testimony that the fire was incendiary in origin.

The Plaintiffs were not permitted to put this issue of fact before a jury of their peers. Instead, the Defendant insurance company was permitted to exclude Plaintiffs' fellow black persons from the jury. The Defendant insurance company even exercised a peremptory challenge on a black person who was employed by an insurance

company! The insurance company, thus, sought to take advantage of whatever racial bias might exist in the jury pool, in order to have its version of events accepted. This tactic worked, and Dixie Insurance Company obtained a verdict in its favor.

The United States Court of Appeals for the Fifth Circuit permitted this result to stand because of its en banc decision in Edmondson v. Leesville Concrete Co., Inc., 895 F. 2d 218 (5th Cir. 1990). Edmondson held that "state action" is not present when a private party exercises peremptory challenges. Therefore, the Fifth Circuit ruled that Batson v. Kentucky, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which prohibits exercise of peremptory challenges for racial reasons in a criminal case, is inapplicable. This ruling conflicts with the holdings of the United States Court of Appeals for the Eleventh Circuit in Fludd v. Dykes, 863 F. 2d 822 (11th Cir. 1989), which held that the principles of Batson "are equally applicable in the civil context". The decision also conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in Reynolds v. City of Little Rock, 893 F. 2d 1004 (8th Cir. 1989), which held that the equal protection clause ofthe Fourteenth Amendment does not "contain any latent distinction between criminal and civil process". Further the Fifth Circuit's interpretation conflicts with the interpretation given Batson by state appellant courts of Florida, City of Miami v. Cornett, 463 So. 2d 399 (FL App. 1985)

and California, Holley v. J. & S Weeping Co., 192 Cal. Rep.74 (1983).

The Fifth Circuit's reasoning is that the exclusion of the black jurors is not due to any action by a "government actor", but is action by a private individual (the attorney for the insurance company); thus, the Constitution provides no remedy. While the Fifth Circuit was correct in holding that "state action" is a condition for the applicability of the Fifth and Fourteenth Amendments, this Court's most analogous precedents indicate such state action was present. The leading decision is Lugar v. Edmondson Oil Co., Inc., 457 U. S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Lugar establishes the broad principle that the Fourteenth and Fifth Amendments only apply to actions which may be "fairly attributable to the state". Lugar set forth a two (2) part test for making this determination:

> "First the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible."

457 U. S. at 937.

This first part of Lugar was conceded by the Fifth Circuit to be present, since the exercise of peremptory challenges is certainly an exercise of a "right or privilege created by the state". Indeed, the right to exercise peremptory challenges is granted by statute, 28 USC Sec. 1870.

The second part of the Lugar test requires that the party charged with the deprivation be a "state actor". Lugar held:

> "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state...."

457 U. S. at 937.

The Fifth Circuit held this "state actor" requirement to be absent, on the theory that a private attorney can never be a state actor. However, this holding is a misapplication of Lugar.

Lugar held the "state action" requirement present on facts very similar to these. In Lugar, under a state statute, a private creditor had the right to obtain property without prior due process hearing, by filing an ex parte affidavit. Upon the filing of the petition, a court clerk was required by law to issue the writ of attachment commanding the seizure of the property.

Notwithstanding that the clerk had no discretion to refuse to issue the writ once the private creditor asked for it, this Court held the "state action" requirement was met by this "joint action" between the clerk and the private creditor. This is precisely like the present case. While the District Judge, like the court clerk in Lugar, may have no discretion to refuse to excuse a juror who is challenged by a private party; nevertheless, the judge participates jointly with the private party in excusing the jurors. It is the judge who orders the black jurors from the courtroom, and will have them jailed if they refuse to go. It is the judge who then enters a judgment based

on the verdict of an all white jury from which the blacks had been excused. Thus, there is joint action in the same sense as in Lugar.

In Burton v. Wilmington Parking Authority, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), the state leased a building to a private lessee. The private lessee refused service to a black patron. This Court rejected the contention that the Fourteenth Amendment provided no remedy, finding the requisite "state action". This Court said that the state had:

> "[E]lected to place its power, property and prestige behind the admitted discrimination."

365 U. S. at 725.

Here, the government has placed its "power, property and prestige" behind the admitted discrimination in the private party's exercise of peremptory challenges. The "power" of the judge is behind the exercise of the challenges, since it is the Judge who excuses the black jurors, and then enters a judgment on a verdict based entirely on the verdict of white persons. The "property" of the government is behind the alleged discrimination, since, as in Burton, the government provides the property (the courthouse) where the discrimination occurs. The "prestige" of the government is behind the discrimination because it is the judge, who, sitting beside an American flag, and with the Marshals of the United States at his side, directs the exit of the black jurors.

In Terry v. Adams, 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed 1152 (1953), the Jaybird Party, a private political party, excluded blacks

from voting on the party's nominees. Persons nominated by the Jaybird Party were then placed on the ballots for governmental offices. This Court held the actions of the Jaybird party were "state action" since they were "an integral part, indeed the only effective part, of the election process". 345 U. S. at 469. In Terry, a private party was able to determine identity of those persons who held public office, since the private party dictated this, through its private nominating procedure. In this case, a private party is able to determine what persons hold the public office of trial jurors, since the private party dictates this through peremptory challenges. Just as the nomination process in Terry, was an "integral part" of the election process, the jury selection process is an "integral part" of the trial.

In Adickes v. S. H. Kress & Co., 398 U. S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970) a white person who ate lunch with black

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[1]In determining state action, the Court has utilized the "symbiotic relationship" test, Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961), the "public function" test, Jackson v. Metropolitan Edison Co., 419 U. S. 345 (1974), and the "nexus between the state and challenged activity" test, Blum v. Yaretsky 457 U. S. 991 (1982, Flagg Bros. v. Brooks, 346 U. S. 149 (1978). Adickes applied the "joint participation" test which is most applicable here.

persons, was arrested upon leaving the store. She sued the private store owner. The District Court granted summary judgment for the Defendant, claiming an absence of any state action. This Court reversed, holding the Defendants' evidentiary materials failed to negate the possibility of an "understanding between store employees and of police" that the Plaintiff would be arrested. Such an "understanding" between state officials and a private party, this Court held, would support the state action requirement. This is like the present case. Without an "understanding" by the District Judge that the persons named by the insurance company could be excused from the jury, the peremptory challenges excusing the black persons could not be exercised. The insurance company is permitted to eliminate blacks from the jury only because there is an understanding between the private attorney and the trial judge, the "understanding" mandated by statute or court rule.

The above precedents can not be squared with the Fifth Circuit's over-refined distinction between a criminal trial and a civil trial. The Fifth Circuit thought it significant that the actual decision maker is a non-state party, the lawyer for the private party. But the inescapable, practical fact is that it is the power of the government that enforces the private party's decision. Assume, for example, that the two (2) black jurors had observed that the black Plaintiff was being left only with white persons to serve on his jury. Assume they

objected. Who, then, would order them dragged from the courtroom. Unfortunately, under the law as the Fifth Circuit announced it, the federal judge would be compelled to so order. Perhaps he would even explain that the law permits exercise of peremptory challenges based on race.

In this very case, when the black Plaintiff objected to having blacks removed from his jury, the federal judge gave his stamp of approval to the procedure by overruling the objection. When the judge overruled Plaintiff's objection, and sustained the challenges of the private party, was not this the joint hand of the government, just as surely as the joint hand of the government was involved in issuing the unconstitutional writ in Lugar?

In short, the majesty and power of the government lurks implicitly within the exclusion of jurors, whether done in a criminal or civil trial. The distinction drawn by the Fifth Circuit is artificial and unperceived by the black citizens who are subjected to it. The Writ should be granted, and the decision of the Fifth Circuit Court of Appeals reversed.

Respectfully Submitted,

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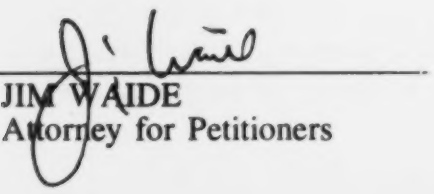

JIM WAIDE
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Petitioners, do hereby certify that I have this day mailed, postage prepaid, ~~a true and correct copy~~ 3 copies of the above and foregoing to the following:

Honorable Suzanne Saunders
P. O. Box 16295
Jackson, MS 39236

This the 3 day of August, 1990.

JIM WAIDE

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES L. POLK AND MATTIE B. POLK,

Plaintiffs-Appellants

V.

DIXIE INSURANCE COMPANY,

Defendant-Appellee

No. 88-4737
Summary Calendar.

April 11, 1990

Appeal from the United States District Court for the Northern District of Mississippi.

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

GARWOOD, Circuit Judge:

This is a Mississippi law diversity suit brought in January 1987 by plaintiffs-appellants James L. Polk (Polk) and Mattie B. Polk against defendant-appellee Dixie Insurance Company (Dixie), the insurer of Polk's 1981 Cadillac Seville which was totally destroyed in a July 31, 1986 fire, for insurance policy proceeds due for the loss of the car and for punitive damages for bad faith denial of the claim. Dixie defended on the grounds of arson. The district court granted Dixie's motion for summary judgment on the punitive damages claim, and the policy claim was thereafter tried to a jury which returned a verdict for Dixie. The district court then rendered judgment for Dixie on the verdict, and this appeal by plaintiffs followed.

[1] Plaintiffs raise three claims of error. They first contend that the district court erred in refusing their timely motion that Dixie's counsel be required to "indicate some non-racial motive for exercising" two peremptory challenges "on the only black jurors that were tendered to her," as the plaintiffs were black "and all the representatives at the defense table are white."

Before Dixie's counsel responded, the district court ruled that the "motion will be denied, the Government not being involved in this case. Plaintiffs rely on *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). However in *Edmonson v. Leesville Concrete Co., Inc.*, 895 F.2d 218 (5th Cir.1990), this Court, en banc, held that *Batson* does not apply to a civil suit solely between private parties. Consequently, we reject plaintiffs' first claim of error.

The second claim is that the district court erred in permitting certain testimony by Dixie's witness Embrey, the independent insurance agent through whom Polk procured the Dixie policy in question in August 1985. The complained of testimony, which came on the second day of trial, was that on July 21, 1986—some ten days before the Cadillac burned—Embrey had written Polk advising him that the policy was due for renewal on August 9, 1986 and that the premium for the renewal policy would be $435 higher than that for the current policy; that Polk called Embrey two or three days after the letter was sent and "he was upset about it because of how much increase it was" and could not understand why it was "that much higher" since he had not had any claim or accident or tickets in the past year; and that Embrey explained to him that this was the result of a new rating system being used by Dixie and he "had a high rated car," was twenty-five years old and single, and had two or three speeding or driving with suspended license violations charged against him and "so he was in a high rated class."

[2] The sole basis for objection to this testimony was that it tended to show an arson motive on Polk's part not disclosed in Dixie's answer, filed some seven months before trial and never updated, to one of plaintiffs' interrogatories. The interrogatory and answer in question were as follows:

"State the complete factual basis of your claim that Plaintiff intentionally burned his own automobile."

and

". . . James L. Polk, owner and insured of the burned automobile, had the opportunity to burn his own automobile as per his testimony and statements, he had the motive based upon the fact that he was out of work and behind on his car payment and there was an incendiary act as revealed by three fire experts."

At a hearing on this objection out of the jury's presence, counsel for Dixie advised the court that she did not know of Embrey's anticipated testimony in this respect until the previous day. She had subpoenaed Embrey—who was listed as a Dixie "fact" witness (but without other indication of the subject matter of his testimony) on the pretrial order filed some seven months before trial—to testify in respect to Polk's claim that when he purchased the Dixie policy he did so with the understnding that it covered his medical expenses (expenses of the kind which he claimed to have incurred when he allegedly jumped out of the Cadillac when it, according to him, went off the road and burned up on July 31). Embrey corroborated Dixie's counsel's assertions in this respect, testifying that he did not tell her or Dixie of the above-mentioned premium matter until the day before, although he had previously talked with her about Polk's claim concerning the nature of the coverage provided by the policy and whether it included medical expenses.

[3] The district court clearly credited this explanation, and refused to exclude the testimony. Review of its ruling is under an abuse of discretion standard. *See Murphy v. Magnolia Electric Power Ass'n*, 639 F.2d 232, 234 (5th Cir.1981) ("the district judge enjoys considerable discretion"); *Bunch v. United States*, 680 F.2d 1271, 1280 (9th Cir.1982) ("left to the sound discretion of the trial judge," reversible in instances of "a gross abuse of discretion"). We are unable to find any such abuse here. *See O'—Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1547-49 (11th Cir.1984).

In the first place, the duty to update interrogatory answers exists only when it is learned that the original answer is no longer true and the failure to amend amounts in substance to a knowing concealment. *Id.* at 1548; *Bunch*, 680 F.2d at 1282. Here the district court found, on adequate evidence, that that was not the case. Moreover, we normally do not reverse for unfair surprise unless "a completely new issue is suddenly raised or a previously unidentified expert witness is suddenly called." *F & S Offshore Inc. v. K. O. Steel Castings, Inc.*, 662 F.2d 1104, 1108 (5th Cir.1981). Assuming, *arguendo*, that the same rational should apply to a crucial fact witness, nevertheless Embrey was listed as a fact witness and the issue of financial motivation had clearly been raised. Further, the usual remedy for surprise is to request a continuance. *See O'Donnell*, 748 F.2d at 1549. Here, however, not only was there no request for a continuance, there was not even any claim—certainly no express or unmistakably implied claim—of surprise below.

We are unable to say that the district court abused its discretion in allowing the challenged testimony.

[4] Plaintiff's third and final claim of error is that the district court erroneously granted summary judgment against plaintiffs on their punitive damages claim. Plaintiffs concede that "the insurance company's expensive experts no doubt afforded evidence that the fire was incendiary" and "[t]here is also no doubt the insured [Polk] had the 'opportunity' " to start the fire, but contend that there was no summary judgment showing that Dixie "prior to denying the claims" had "any evidence of motive," because its only then evidence of motive was "the fact that the insured had been laid off from work, and was behind one car payment." It is argued that this evidence was insufficient to show motive because the insured likely could have gotten as much by selling the car as by burning it and collecting the insurance.

Plaintiffs' argument in this connection is made in what can only be characterized as a bizarre context. Plaintiffs do not challenge the jury's verdict that no recovery is due on the insurance policy, a finding that in the context of this case necessarily implies that

Polk intentionally burned the Cadillac. Although Mississippi law is not clear on the point, it would seem most unusual—to say the least— to authorize recovery of punitive damages for the denial of a claim which was not due or owing and which the plaintiff had no right to have paid. It is true that in several opinions, the Mississippi Supreme Court has stated that the question of punitive damages turns on assessment of the insurance company's conduct in light of the information available to it when acting on the claim. *See, e.g., State Farm Fire and Cas. Co. v. Simpson*, 477 So.2d 242, 252 (Miss.1985). Nevertheless, this seems designed to prevent and award of punitve damages even though later events prove the insurance company's denial of claim to have been mistaken, so long as it did not act in bad faith or with gross negligence at the time or times it denied the claim. That Mississippi law does not contemplate punitive damages for denial of an *invalid* claim is reflected in statements in several Mississippi Supreme Court opinions which clearly *assume* the validity of the claim. Thus, in *Progressive Casuality Ins. Co. v. Keys*, 317 So.2d 396 (Miss.1975), the court indicated that ""[p]unitive damages are not recoverable for the *breach* of a contract, *unless such breach* is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent fact." *Id.* at 398 (emphasis added). Plainly, a *breach* of contract is contemplated. Similarly, in *Standard Life Ins. Co. v. Veal*, 354 So.2d 239 (Miss.1977), the court, in justifying the availability of punitive damages in insurance company bad faith refusal to pay cases, speaks time and again of the refusal to pay "a *legitimate* claim." *Id.* at 248 (emphasis added). We doubt that in speaking of "legitimate" claims, the court was including those which were invalid and not owing. *Veal* also speaks of the need for punitive damages to be available so that insurance companies will not force "an inadequate settlement or avoid payment entirely." *Id.* Surely, however, the punitive damages rule is not intended to pressure settlement or payment of *invalid* claims, which simply prejudices the insurance buying public generally even apart from its evident injustice otherwise. Further, in *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So.2d 833, 843 & n. 4 (Miss. 1984), the court stated that in nearly all cases where the claiment was *not* entitled to a directed verdict on the issue of policy liability, the in-

surance company *would* be entitled to a directed verdict on bad faith refusal, and that in the rare case where the insurance company was not entitled, it would be proper to submit the "issue of liability [under the policy] to the jury first, and *if* the jury finds for the plaintiff, *then* submit[] the issue of punitive damages based on bad faith." *Id.* at n. 4 (emphasis added). This plainly implies that in no case may the plaintiff recover bad faith refusal punitive damages if it is determined that the denied claim was invalid and not owing.

Even if we assumed that Mississsippi would go so far as to allow punitve damages for the bad faith handling of an *invalid* claim in some instances—for example, if the claim were made reasonably and in good faith and the insurer's egregious conduct harmed the claimant in some way distinct from the damage which would result from merely denying the claim—we simply cannot bring ourselves to conclude that she would go still further and allow punitive damages to one whose invalid claim was denied at a time when there was no arguable reason for denial but which was later established to be false and fraudulent. Such a rule, we must presume, would shock the conscience of even the most enthusiastic advocate of awarding punitive damages against insurers. Hence, the unchallenged verdict here on the policy claim concludes the punitive damages issue.

[5-8] In any event, the district court's summary judgment ruling was clearly correct, considered on its own. While arson as a policy defense must be proved by the insurer by clear and convincing evidence, *McGory v. Allstate Ins. Co.*, 527 So.2d 632 (Miss.1988), the plaintiff has the burden of proof on bad faith refusal and lack of an arguable basis for denial. *See Blue Cross*, 466 So.2d at 844 ("[T]he plaintiff has a heavy burden to demonstrate to the trial court that there was no reasonably arguable basis for the insurance carrier to deny the claim. Unless he so demonstrates, the trial court as a matter of law is under a duty to remove any punitive damages claims...."). The plaintiff's burden in this respect likewise exists at the summary judgment stage where the insurance company presents an adequate *prima facie* showing of a reasonable arguable basis for denial so as to preclude punitive damages. *See*

American Manufacturers Mutual Liability Ins. Co. v. Cupstid, 673 F.Supp. 186, 188 (S.D.Miss. 1987). While, at least in a circumstantial evidence case, the policy defense of arson requires a showing of motive as well as of incendiary origin and opportunity, *McGory*, it is by no means clear that in order to have an arguable reason to deny a claim the insurance company must *then* be able to *prove* that it is invalid, as opposed to having a good reason to believe that it is. In any event, there was concededly an adequate summary judgment showing of incendiary origin and opportunity—indeed, Polk was the only one on the scene—and at least a colorable showing of motive, Polk's having been laid off work and being three weeks' late with a $300 payment on the car. The insurance company could infer that there was a financial incentive for Polk to burn the car and collect the insurance rather than risk the note's being called while he tried to sell it at a decent price. Even if this inference were quite weak, the insurance company nevertheless had an arguable reason to deny. The evidence of incendiary origin was rather strong, and the circumstances of the event were such that if the fire *were* incendiary Polk was in all likelihood the culprit. This conclusion would be strongly reinforced by the contradictory stories Polk told about the events in question, another factor relied on by Dixie in its denial and by the district court in its summary judgment ruling. Also, Polk had a few months previously bought another, less expensive, car on which payments were being made.

We note that in *Sutton v. Northern Ins. Co. of New York*, 681 F.Supp. 1221 (S.D. Miss.1988), a summary judgment for the insurance company on the punitive damages issue was granted on the basis that suspected arson formed an arguable basis for claim denial, notwithstanding that "the evidence of financial difficulty was not particularly compelling." *Id.* at 1223. *Sutton* further observes that "motive is not always an indispensable element in an arson defense," as, for example, "the arson defense could be established if it were shown that only the insured could have had access to the premises at the time of the fire." *Id.* at 1224 n. 4. Here, while Polk was not shown to be the only person who could have had access, the circumstances strongly suggest that if the fire was incendiary, it was set by Polk (or at his direction). Moreover, as noted, he gave con-

flicting statements about the event. In *McGory,* the court held that the insurance company could get to the jury on its arson defense to the policy claim, even though the plaintiffs had "all but airtight alibis" and "[i]n one sense Allstate's [the insurer's] proof on the opportunity issue fails as a matter of law," because "Allstate's proof of on incendiarism and notice is quite substantial and has a force we find it difficult to ignore." *Id.*, 527 So.2d at 636-37. Here, where we are dealing with the arguable basis question (not the ultimate merits of the policy defense itself, as in *McGory*), the evidence of incendiarism and opportunity known to Dixie was "quite substantial" and, considered in light of the other evidence then known to Dixie, principally Polk's inconsistent statements, sufficed to overcome any weakness in the then known motive evidence and to constitute a reasonable arguable basis for denial as a matter of law.

For these reasons, we reject plaintiffs' complaint concerning the district court's summary judgment rejection of the punitive damages claim.

Having rejected each of plaintiff's three claims of error, the district court's judgment is accordingly.

AFFIRMED.

Supreme Court, U.S.
FILED
SEP 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-240

In The

Supreme Court of the United States

October Term, 1990

JAMES L. POLK AND MATTIE B. POLK,

Petitioners,

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the equal protection clause of the Fourteenth Amendment prohibits the prosecutor in a state criminal case from exercising peremptory challenges for racially discriminatory reasons to remove members of the defendant's race from the venire.

By federal statute, 28 U.S.C. § 1870, each party in a civil case is entitled to three (3) peremptory challenges to prospective jurors. Exercising that right at the trial of this diversity civil case in the district court below, respondent Dixie Insurance Co. (Dixie) made peremptory challenges to three (3) prospective jurors: one white and two blacks. III R. 30-31.

At the conclusion of the peremptory challenge conference with the district court and without citing any authority, petitioners James L. and Mattie B. Polk (the Polks), who are black, moved the district court to require Dixie to state some reason in the record for exercising the peremptory challenges on the only two black jurors that were tendered to Dixie. Without asking for a response by Dixie, the district court promptly denied the motion by stating: "All right. That motion will be denied, *the Government not being involved in this case.*" III R. 30-31 (emphasis added); Pet. 3. The Polks did *not* argue to the district court that the district court's participation in the jury selection process supplied the requisite governmental action. This case was then tried to the jury resulting in a verdict for Dixie. The district court entered judgment in favor of Dixie.

QUESTIONS PRESENTED – Continued

The Polks appealed to the United States Court of Appeals for the Fifth Circuit and argued that the district court erred in denying their motion. The Fifth Circuit summarily affirmed the district court on this point, stating that it was bound by its en banc decision in *Edmondson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), which held that *Batson* does not apply to a civil suit between private parties. *Polk v. Dixie Insurance Co.*, 897 F.2d 1346, 1347 (5th Cir. 1990).

The questions presented are:

1. Whether the petitioners properly raised and preserved for review their *Batson* claim by failing to argue to the district court that it was the district court's participation in the jury selection process which supplied the requisite governmental action.

2. If the answer to question 1 is yes, whether the exercise of peremptory challenges to prospective jurors by a private litigant in a civil case in federal district court constitutes governmental action within the meaning of the Fifth Amendment of the United States Constitution.

3. If the answer to question 2 is yes, whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), should be extended to civil cases between private parties.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioners James L. Polk and Mattie B. Polk and the respondent, Dixie Insurance Co.

The Senatobia Bank, the lienholder on Mr. Polk's Cadillac automobile, was a defendant in the district court but was dismissed by stipulation of dismissal with prejudice on February 17, 1988.

Pursuant to Rule 29.1, Dixie Insurance Co. lists its parent corporations and subsidiary corporations (excluding wholly owned subsidiaries):

Dixie Insurance Company is a wholly-owned subsidiary of Stonewall Insurance Company; Stonewall Insurance Company, in turn, is a wholly-owned subsidiary of Great American Insurance Company; Great American Insurance Company, in turn, is a wholly-owned subsidiary of Great American Holding Corporation; Great American Holding Corporation, in turn, is a wholly-owned subsidiary of American Financial Corporation, the ultimate parent.

The following is a list of subsidiaries partially owned by American Financial Corporation:

The Charter Company
Chiquita Brands International, Inc.
(and subsidiaries)
Nordstrom Management Services, Ltd.
Transportation Indemnity, Ltd.
Nordstrom Agency of Houston, Inc.
American Business Insurance, Inc.

LIST OF PARTIES AND RULE 29.1 LIST – Continued

American Business Insurance Agency of Texas, Inc.
Frederick Rauh & Company
American Financial Enterprises, Inc.
The Pen Central Corporation
Detroit Manufacturers Railroad Company
The New York and Harlem Railroad Company
The Ann Arbor Railroad Company
D.I.Industries
Carol Cable Company Limited
Multiway Industries (H.K.) Limited
Holden Energy Corporation
Pennsylvania-Reading Seashore Lines
Pittsburgh and Cross Creek Railroad Company
Sprague Technologies, Inc. (and subsidiaries)
Brothers Property Corporation
Great American Communications Company
Spelling Entertainment, Inc.
Ocean Reef Club, Inc.
Great American Lloyd's Insurance Company
Casualty Underwriter's, Inc.
Hallmark General Insurance Agency
National Interstate Corporation
National Interstate Insurance Agency of Texas, Inc.
Boca Grande Club, Inc.
Transport Insurance Agency, Inc.
Mission Insurance Group, Inc. (and subsidiaries)

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No. 90-240

In The

Supreme Court of the United States

October Term, 1990

JAMES L. POLK AND MATTIE B. POLK,

Petitioners,

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dixie Insurance Company [Dixie] respectfully requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The April 11, 1990, Opinion of the United States Court of Appeals for the Fifth Circuit is officially

reported at *Polk v. Dixie Insurance Co.*, 897 F.2d 1346 (5th Cir. 1990). It is attached as an Appendix to the Petition.

JURISDICTION

The district court's subject matter jurisdiction was based upon complete diversity of citizenship between the parties, satisfaction of the amount in controversy requirement, 28 U.S.C. § 1332, and a timely removal of this action on February 25, 1987 from the Circuit Court of Marshall County, Mississippi, where it was filed originally on January 26, 1987. 28 U.S.C. § 1441.

The court of appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 of the Polks' appeal from the district court's final judgment, which was entered on September 19, 1988, II R. 491-92. The Polks' notice of appeal to the Fifth Circuit was timely filed on October 4, 1988, II R. 497, within 30 days of entry of the district court's final judgment, *see* F.R.A.P. 4(a).

Where a petition for certiorari is filed with this Court within 90 days of the judgment of a court of appeals, 28 U.S.C. § 2101(c), Rule 13, this Court has jurisdiction to review decisions of the courts of appeals by writ of certiorari under 28 U.S.C. § 1254. The Fifth Circuit's opinion below was entered on April 11, 1990. On July 9, 1990, the petitioners filed a petition for writ of certiorari which did not comply with the printing requirements of the rules of this Court. By letter dated July 12, 1990, the Clerk of Court advised the petitioners' attorney that the petition must be corrected and that upon receipt of a corrected petition it would be filed as of the date of the

original petition. The corrected petition was received by the Clerk on August 6, 1990.

STATEMENT OF THE CASE

The Statement of the Case found at pages 2-5 of the petition must be supplemented.

In ruling on the petitioners' motion that Dixie be required to state nonracial reasons for exercising peremptory challenges to the two black jurors tendered to it, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 30-31 (emphasis added); Pet. 3.[1]

The petitioners' counsel did not raise before the district court the question of whether the district court's role in the jury selection process supplied the requisite governmental action to make the Fifth Amendment applicable to Dixie's exercise of its peremptory challenges.

[1] Because of the district court's speedy ruling on the motion, Dixie was unable to respond to the motion, and its reasons for exercising the two questioned peremptory challenges are not of record. Dixie denies that the challenges were made for racially discriminatory reasons.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

When petitioners' counsel began to make his *Batson* motion to the district Court, the district court stated:

> You understand that the government is not involved in this case?

III R. 30; Pet. 3. Petitioners' counsel responded: "Yes, sir, I do . . . " and proceeded to make his motion. After the motion was made and before Dixie's counsel could respond, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 31 (emphasis added); Pet. 3. Petitioners did not present to the district court their argument here that the trial judge's participation in the jury selection process supplied the required governmental action.

The district court clearly based its ruling on the fact that the government was not involved in the case and that, therefore, no governmental action was present to make *Batson* applicable.

It is elementary that this Court does not ordinarily review questions which were not properly raised below and preserved for review. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule has the obvious purposes of allowing the court below first to address the issue and for this Court to have the benefit of the lower court's reasoning. Here, the district court obviously based its ruling on the fact that the government was not a litigant in the case, and the petitioners did not present to the district court their argument advanced in the petition that it was the

district court's participation which supplied the required governmental action. Thus, the petitioners did not properly raise the governmental action issue in the district court, and the petition should be properly denied for that reason alone.

There is no conflict between the circuits or state courts of last resort requiring the granting of certiorari in this case. Petitioners argue that certiorari should be granted because the Fifth Circuit's decision conflicts with the decisions of the Eighth and Eleventh Circuits in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.), *cert. denied sub nom. Tiller v. Fludd*, 110 S. Ct. 201 (1989), and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1989), *pet. for cert. filed sub nom. City of Little Rock v. Reynolds*, 59 U.S.L.W. 3053 (U.S. June 25, 1990) (No. 90-1). Petitioners also argue that the Fifth Circuit's decision conflicts with decisions by the state appellate courts of Florida, *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d D.C.A. 1985), and California, *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Reptr. 74, 77-78 (Cal. 1st Ct. App. 1983). Pet. 6-7. However, properly understood, those decisions do not create a conflict with the Fifth Circuit sufficient to warrant review by this Court.

In *Reynolds* the Eighth Circuit held that *Batson* applies to the conduct of a governmental litigant in a civil trial, specifically governing its exercise of peremptory challenges. 893 F.2d at 1005. However, the Eighth Circuit explicitly stated that it expressed "no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.* at 1008. In *Edmondson* the Fifth Circuit stated that it had "no occasion to consider

the situation presented where the state appears as a civil litigant." 895 F.2d at 222 n.18. Thus, *Reynolds* does not conflict with the Fifth Circuit's holding on the nonapplicability of *Batson* because of the lack of governmental action.

In *Fludd v. Dykes*, the Eleventh Circuit did hold that *Batson* applied in civil as well as criminal cases and specifically that the exercise of peremptory challenges by governmental litigants in a civil action were subject to the constraints of *Batson*. The court, in dicta, ruled that the actions of the trial judge supplied the requisite governmental action. 863 F.2d at 828. This discussion is clearly dicta because the court was considering the exercise of peremptory challenges by *governmental official* litigants. Therefore, the governmental action issue in *Fludd* should have properly been resolved as it was in *Reynolds* on that fact alone.

The state court decisions upon which petitioners rely do not warrant the exercise of certiorari jurisdiction by this Court because the state courts are not "state courts of last resort" as specified by Rule 10.1(a). In any event, both decisions are plainly distinguishable. *Cornett* was based exclusively on the Florida constitution, involved the exercise of peremptory challenges by a governmental litigant, the City of Miami, and did not analyze the governmental action issue. *Holley* was based on the California constitution and contained no state action analysis.

Finally, to the extent that the *Fludd v. Dykes* dicta on the state action issue conflicts with the Fifth Circuit's decision here, Dixie respectfully suggests that the Court should allow this issue to reach decisions in other courts

of appeals so that this Court will have the benefit of more than just two analyses of this issue.

The Fifth Circuit's decision is consistent with this Court's precedents on determining governmental action. Petitioners argue that the Fifth Circuit's decision misapplied this Court's opinion in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and is inconsistent with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Pet. 7-12. A careful review of the Fifth Circuit's decision in *Edmondson* and this Court's precedents reveals that *Edmondson* is fully consistent with those precedents.

This Court has stated that generalities cannot control this determination of governmental action, and the outcome of each case depends upon its particular facts and circumstances. *Burton*, 365 U.S. at 722.

The Fifth Circuit explicitly acknowledged and applied *Lugar*'s two-part test for identifying governmental action, 457 U.S. at 937. *Edmondson*, 895 F.2d at 221. The Fifth Circuit concluded that the first part was met because the exercise of a peremptory challenge was authorized by a federal statute. 895 F.2d at 221. However, the Fifth Circuit correctly concluded that there was no state actor causing the deprivation.

Petitioners argue that the holding in *Lugar*, that the actions of the state court clerk in approving the writ under the unconstitutional state prejudgment attachment statute, applies to the trial judge here. This is plainly wrong because the Court in *Lugar* noted that its holding was "limited to the particular context of prejudgment

attachment." 457 U.S. at 939 n.21. *Lugar* does not compel a holding that the trial judge here supplied the requisite governmental action to a private party's exercise of peremptory challenges. To do so would be inconsistent with this Court's observations in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State[ ]" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." As the en banc Fifth Circuit correctly observed: "The merely ministerial function exercised by the judge simply in permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined." 895 F.2d at 221 (footnote omitted).

The Fifth Circuit also noted, 895 F.2d at 222, that it was hard to see how this Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S. at 89 n.12.

Burton v. Wilmington Parking Authority is distinguishable on its facts because of the extensive symbiotic relationship there between the private restaurant engaged in racial discrimination and its landlord, a state parking authority, and the fact that the state parking authority was receiving benefits from the restaurant. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 n.16 (1988) (distinguishing

Burton based on the interdependence between the restaurant and the parking authority.)

Terry v. Adams is distinguishable because the Jaybird primary was an integral part of the county election process. As correctly observed by the Fifth Circuit, "The traditional roles of private counsel and the state have remained discrete in this case." 895 F.2d at 222. Likewise, *Adickes* is completely distinguishable on its facts because there both state law and custom coerced and encouraged racial segregation in the use of public restaurants. Here, there is no comparable federal action coercing or significantly encouraging racial discrimination in the exercise of peremptory challenges by private parties in civil cases in federal court.

As the Fifth Circuit also correctly noted, 895 F.2d at 222, the actions of private counsel cannot supply the requisite state action. In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), this Court held that a public defender, paid by the state, is not a state actor when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding.

ARGUMENT FOR DENYING THE PETITION

I. The petitioners failed to raise properly the Fifth Amendment governmental action issue before the district court.

As noted above, this case presents two substantive questions for review: (1) Whether the exercise of peremptory challenges by a private litigant in a civil case in federal district court constitutes governmental action within the meaning of the Fifth Amendment and, if so, (2)

whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), should be extended to civil cases between private litigants.

When petitioners' counsel began to make his *Batson* motion, the district court stated:

> You understand that the government is not involved in this case?

III R. 30; Pet. 3. Petitioners' counsel responded: "Yes, sir, I do . . . " and proceeded to make his motion. After the motion was made and before Dixie's counsel could respond, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 31 (emphasis added); Pet. 3.

The district court clearly based its ruling on the fact that the government was not involved in the case and that, therefore, no governmental action was present to make applicable the *Batson* rule. Petitioners' counsel failed to raise squarely the governmental action issue with the district court.

It is elementary that this Court does not ordinarily review questions which were not properly raised below and preserved for review. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule has the obvious purposes of allowing the court below first to address the issue and for this Court to have the benefit of the lower court's reasoning. Here, the district court obviously based its ruling on the fact that the government was not a litigant in the case, and the petitioners did not present to the district court

their argument advanced in the petition that it was the *district court's participation* which supplied the required governmental action. Thus, the petitioners did not properly raise the governmental action issue in the district court, and the petition should be properly denied for that reason alone.

II. There is no conflict among the circuits or state courts of last resort requiring the granting of certiorari in this case.

Petitioners argue that certiorari should be granted because the Fifth Circuit's decision conflicts with the decisions of the Eighth and Eleventh Circuits in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.), *cert. denied sub nom. Tiller v. Fludd*, 110 S. Ct. 201 (1989), and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1989), *pet. for cert. filed sub nom. City of Little Rock v. Reynolds*, 59 U.S.L.W. 3053 (U.S. June 25, 1990) (No. 90-1). Petitioners also argue that the Fifth Circuit's decision conflicts with decisions by the state appellate courts of Florida, *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d D.C.A. 1985), and California, *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Reptr. 74, 77-78 (Cal. 1st Ct. App. 1983). Pet. 6-7. However, properly understood, those decisions do not create a conflict with the Fifth Circuit sufficient to warrant review by this Court.

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the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.* at 1008. In *Edmondson* the Fifth Circuit stated that it had "no occasion to consider the situation presented where the state appears as a civil litigant." 895 F.2d at 222 n.18. Thus, *Reynolds* does not conflict with the Fifth Circuit's holding on the nonapplicability of *Batson* because of no governmental action.

In *Fludd v. Dykes*, the Eleventh Circuit did hold that *Batson* applied in civil as well as criminal cases and specifically that the exercise of peremptory challenges by governmental litigants in a civil action were subject to the constraints of *Batson*. The court, in dicta, ruled that the actions of the trial judge supplied the requisite governmental action. 863 F.2d at 828. This discussion is clearly dicta because the court was considering the exercise of peremptory challenges by governmental official litigants. Therefore, the governmental action issue in *Fludd* should have properly been resolved as it was in *Reynolds* on that fact alone.

Therefore, properly understood, these two decisions are distinguishable from the Fifth Circuit's decision here which involves private litigants and do not create a conflict sufficient to warrant the exercise of this Court's jurisdiction.

The state court decisions upon which petitioners rely do not create the necessary conflict sufficient to warrant the exercise of certiorari jurisdiction by this Court because the state courts are not "state courts of last resort" as specified by Rule 10.1(a). In any event, both decisions are plainly distinguishable. *Cornett* was based

exclusively on the Florida constitution, involved the exercise of peremptory challenges by a governmental litigant, the City of Miami, and did not analyze the governmental action issue. *Holley* was based on the California constitution and contained no state action analysis. Thus, these two decisions clearly do not supply the requisite conflict on a federal question sufficient to warrant the exercise of this Court's certiorari jurisdiction.

Finally, to the extent that the *Fludd v. Dykes* dicta on the state action issue conflicts with the Fifth Circuit's decision here, Dixie respectfully suggests that the Court should allow this issue to reach decision in other courts of appeals so that the Court will have the benefit of more than two analyses of this issue.

III. The Fifth Circuit's decision is consistent with this Court's precedents on determining governmental action.

Petitioners argue that the Fifth Circuit's decision misapplied this Court's opinion in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and is inconsistent with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Pet. 7-12. A careful review of the Fifth Circuit's decision in *Edmondson* and this Court's precedents reveals that *Edmondson* is fully consistent with those precedents.

This Court has stated that generalities cannot control the determination of governmental action, and the outcome of each case depends upon its particular facts and circumstances. *Burton*, 365 U.S. at 722.

In *Edmondson*, 895 F.2d at 221, the Fifth Circuit explicitly acknowledged and applied *Lugar's* following two-part test for identifying state (or governmental) action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937.

The Fifth Circuit concluded that the first part was met because the exercise of peremptory challenges was authorized by federal statute, 28 U.S.C. § 1870. 895 F.2d at 221. However, the Fifth Circuit concluded that there was no state actor causing the deprivation. *Id.*

Petitioners argue that the holding in *Lugar*, that the actions of the state court clerk in approving the writ under the unconstitutional state prejudgment attachment statute, applies to the trial judge here. This is plainly wrong because this Court in *Lugar* noted that its holding was "limited to the particular context of prejudgment attachment." 457 U.S. at 939 n.21. Simply put, the state in *Lugar* created an unconstitutional prejudgment attachment statute and involved a state official in the enforcement process. *Lugar* does not compel a holding that the trial judge here supplies the requisite governmental action to a private party's exercise of peremptory challenges. To do so would be inconsistent with this Court's observations in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), that "a State normally can be held responsible for a private decision only when it has exercised coercive

power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State[ ]" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." As the en banc Fifth Circuit correctly observed: "The merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined." 895 F.2d at 221 (footnote omitted).

The Fifth Circuit also noted, 895 F.2d at 222, that it was hard to see how this Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S. at 89 n.12.

Burton v. Wilmington Parking Authority is distinguishable on its facts because of the extensive symbiotic relationship there between the private restaurant engaged in racial discrimination and its landlord, the state parking authority, and the fact that the state parking authority was receiving benefits from the restaurant. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 n.16 (1988) (distinguishing *Burton* based on the interdependence between the restaurant and the parking authority.)

Terry v. Adams, 345 U.S. 461, 469 (1953), is distinguishable because the Jaybird primary had become an integral and, indeed, the only effective part of the election process in a Texas county. As correctly observed by the Fifth Circuit, "The traditional roles of private counsel

and the state have remained discrete in this case." 895 F.2d at 222.

Likewise, *Adickes* does not support a finding of state action. *Adickes* is distinguishable on its facts because there both state law and custom coerced and encouraged racial segregation in the use of public restaurants. Here, there is no comparable federal action coercing or significantly encouraging the exercise of racially discriminatory peremptory challenges by private parties in civil cases in federal court. Nor is there any record support for petitioners' argument that there was an "understanding" between Dixie and the district court that prospective black jurors would be excused. Pet. 11.

As the Fifth Circuit also correctly noted, 895 F.2d at 222, the actions of private counsel cannot supply the requisite state action. In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), this Court held that a public defender, paid by the state, is not a state actor when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding.

In short, petitioners' argument is to create a test of implicit lurking, Pet. 12, for identifying governmental action. Such a test would admit of no readily perceivable limitations and is not supported by the precedents of this Court.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

DIXIE INSURANCE COMPANY,
Respondent

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September 4, 1990

Supreme Court, U.S.
FILED
OCT 22 19..
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 90-240

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES L. POLK AND MATTIE B. POLK,

Petitioners,

VERSUS

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENT DIXIE INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO MOTION TO CONSOLIDATE

Respondent Dixie Insurance Company [Dixie][1] opposes the petitioners' Motion to Consolidate (served by mail on October 12, 1990) this case with Edmondson v. Leesville

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[1]The listing of Dixie's affiliated corporations required by U. S. Sup. Ct. Rule 29.1 is found on page iv of the Respondent's Brief in Opposition (served on September 4, 1990). There are no amendments to that listing.

Concrete Co., Inc., No. 89-7743, in which certiorari was granted on October 1, 1990, for the following reasons:

1. While Polk and Edmondson involve some of the same issues, there is at least one issue present in Polk which is apparently not present in Edmondson, *i.e.*, whether the petitioners properly raised the argument that the trial judge's participation in excusing prospective jurors supplied the requisite state action.

2. There are no significant factual differences between Edmondson and Polk which would be of assistance to the Court in resolving the issues presented. Consolidation would not assist the Court in its examination of these issues. Instead, consolidation would complicate the briefing and argument of Edmondson by adding two additional attorneys to the process. The more orderly and efficient method for the Court to handle Polk would be to act on Polk once it has ruled in Edmondson. If further action is required by the Fifth Circuit, the Court could then grant certiorari, summarily vacate the Fifth Circuit's judgment in Polk, and remand the case to the Fifth Circuit for further consideration in light of the Supreme Court's decision in Edmondson. See, e.g., Cary v. United States, U. S. Sup. Ct. No. 90-5183 (October 15, 1970) (granting leave to proceed in forma pauperis, granting certiorari, vacating judgment, and remanding to Eighth Circuit for further consideration in light of United States v. Eichman, 496 U.S. __ (1990)); Jones v. ABC, 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990) (No. 89-1952) (granting certiorari, vacating judgment, and remanding case to Eleventh Circuit for further consideration in light of Milkovich v. Lorain Journal Co., 497 U.S. __ (1990)).

3. The Fifth Circuit rejected a similar motion to consolidate Polk with Edmondson before the en banc Fifth Circuit. Polk v. Dixie Insurance Co., 5th Cir. No. 88-4737 (5th Cir. May 15, 1989) (unpublished order; copy attached)

For these reasons, the Petitioners' Motion to Consolidate Polk and Edmondson should be denied.

This, the 19th day of October, 1990.

Respectfully submitted,

DIXIE INSURANCE COMPANY,
Respondent

BY: _____

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CERTIFICATE OF SERVICE

I, Suzanne N. Saunders, counsel for Respondent Dixie Insurance Company, hereby certify that I have this day caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing RESPONDENT DIXIE INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO MOTION TO CONSOLIDATE to the following attorneys of record at their last known mailing addresses, to-wit:

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This, the 19th day of October, 1990.

Susanne N. Saunders

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-4737

U.S. COURT OF APPEALS
FILED
MAY 15 1989
GILBERT F. GANUCHEAU
CLERK

JAMES L. POLK and
MATTIE B. POLK,

Plaintiffs-Appellants,

versus

DIXIE INSURANCE COMPANY,

Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Mississippi

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O R D E R :

IT IS ORDERED that the motion of appellants to consolidate the referenced cause with cause No. 87-4804 - Edmonson vs. Leesville Concrete Company, Inc. - is denied.

Charles Clark
Chief Judge